INJUNCTIONS AGAINST LIQUOR NUISANCES.

CAN a court of equity constitutionally enjoin, as a public nuisance, the use of premises for the illegal sale of intoxicating liquors, without proof that the sale amounts to a nuisance to property?

Most lawyers would, I think, be inclined to answer the question in the negative were it not for the fact that in a number of cases, some of which have apparently been well contested, statutes giving such a power have been upheld, both under the Federal and State Constitutions.[1] In no case, I believe, has such legislation been held unconstitutional, though it has already been adopted and is, apparently, actively and most effectively enforced in no less than seven of the States.[2] The novelty of such a method of enforcing an excise or prohibitory law alone invites a scrutiny of its validity. And the importance of the inquiry is emphasized by the fact that similar provisions, empowering courts of equity to restrain violations of statutory prohibitions against monopolies, trusts, etc., have recently been incorporated in the Interstate Commerce Act,[3] the Anti Trust Act,[4] and the Tariff Act of 1894.[5]

Of the statutes we are now considering, that of Massachusetts may fairly be taken as a type. It is as follows: —

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[1] Schmidt *v.* Cobb, 119 U. S. 286; Kansas *v.* Ziebold, 123 U. S. 623; Kidd *v.* Pearson, 128 U. S. 1; Eilenbecker *v.* District Court of Plymouth Co., 134 U. S. 31; Carleton *v.* Rugg, 149 Mass. 550; Littleton *v.* Fritz, 65 Ia. 488; State *v.* Crawford, 28 Kan. 726, *semble;* State *v.* Currier, 19 Atl. Rep. (N. H.) 1000, *semble;* State *v.* Fraser, 48 N. W. Rep. (N. D.) 343, *semble.*

[2] Mass., Pub. St. c. 380, § 1; N. H., Pub. St. c. 205, §§ 4, 5; Vt., Rev. St. § 3834; Ohio, 2 Rev. St. § 6942; W. Va., Code, c. 32, § 18; Ia., McClain's Code, § 2384; Kan., Comp. L. § 2533; N. D., L. 1890, c. 119, § 13; S. D., L. 1890, c. 101, § 13.

[3] U. S. Stat. 1889, c. 382, §§ 1, 5.

[4] U. S. Stat. 1890, c. 647, § 4.

[5] U. S. Stat. 1894, c. 349, § 74. The Tariff Act, after prohibiting combinations, etc. in restraint of trade, provides, by section 74, "that the several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of section seventy-three of this Act; and it shall be the duty of the several District Attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations."

"The Supreme Judicial Court and Superior Court shall have jurisdiction in equity upon information filed by the District Attorney for the district, or upon the petition of not less than ten legal voters of any town or city, setting forth the fact that any building, place, or tenement therein is resorted to for prostitution, lewdness, or illegal gaming, or is used for the illegal keeping or sale of intoxicating liquors, to restrain, enjoin, or abate the same as a common nuisance, and an injunction for such purpose may be issued by any justice of either of said courts.

The statutes of some of the other States are quite different in details, often, and particularly in the case of North and South Dakota, strongly suggesting the real criminal nature of the law.[1] But the principal involved in all is the same.

In the two cases in which the constitutionality of the statutes under the State Constitutions has been most discussed,[2] they have been sustained on the ground that, while equity cannot enjoin a crime as such, it has always had jurisdiction to restrain nuisances and to regulate the use of property, and that, as the legislature can declare what acts shall constitute a nuisance, it may also declare that the remedies which equity has used against other nuisances may also be employed to restrain such statutory nuisances.

It seems clear that, apart from the statutes, equity would not exercise the jurisdiction which they confer. The act prohibited is in itself nothing but a crime of a very familiar kind, and that equity cannot enjoin a crime as such none will dispute. Nor does it help matters that the illegal act is, or is called, a nuisance. Over nuisances as such, and as they are defined in the

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1 Thus in North Dakota the Attorney General, his assistant, or any citizen of the county, may maintain an action in the name of the State to abate and enjoin the use of premises for the illegal sale, etc. of intoxicating liquors. The injunction is to be granted at the beginning of the action, and may be upon an affidavit and complaint made on information and belief, and without a bond. Upon affidavits showing that intoxicating liquors are illegally sold or kept for sale on the premises, the court or judge must issue a warrant under which an officer must search the premises, invoice all articles found, used in carrying on the unlawful business, seize and hold to abide the event of the action all intoxicating liquors, and seize and hold possession of the premises until final judgment. In proceedings to punish for a contempt, the accused may plead as he would to an indictment, may be required to answer interrogatories, oral or written, and in case of conviction must be punished by a fine of not less than $200 nor more than $1,000, and by imprisonment for not less than ninety days nor more than one year, the same penalties imposed by the statute for the illegal sale itself. N. D. L., 1890, c. 110, § 13.

2 Carleton *v.* Rugg, 149 Mass. 550; Littleton *v.* Fritz, 65 Ia. 488.

criminal law, equity has never assumed jurisdiction. "It seems," says Hawkins,[1] "that a common nuisance may be defined to be an offence against the publick, either by doing a thing which tends to the annoyance of all the King's subjects, or by neglecting to do a thing which the common good requires." And he cites as familiar instances, common bawdy-houses, stages for rope-dancers, gaming-houses, a common scold, etc. An injunction against a scold would indeed be a novelty.

The jurisdiction of equity over a certain class of public nuisances is, however, well settled, and proceeds upon clearly defined grounds. It is not, so far as reported cases go, of very ancient origin. In 1752,[2] Lord Hardwick refused to enjoin the building of a smallpox hospital, and intimated that, if it were a public nuisance, the remedy was by a criminal information by the Attorney General, referring to an unreported case of the stopping of a way behind the Exchange in the city, when Lord King had recommended the Attorney General to prefer an information in the King's Bench. In 1799,[3] Lord Loughborough enjoined the putting of sugar in houses which would be rendered liable to fall thereby, but the case is poorly reported, and the ground for the decision not clear. In 1811,[4] the jurisdiction was questioned by counsel, and Lord Eldon was unable to find any precedents other than the injunction granted by Lord Loughborough. He refused to grant a preliminary injunction against the maintenance of a soap factory. In 1816,[5] upon an application in a suit to which the Attorney General was not a party, for an injunction against the use of a building as a powder mill, Sir Samuel Romilly, counsel for the plaintiffs, admitted that injury to property, not danger to life, was the only ground upon which equity could interfere, and upon this ground Lord Eldon granted a preliminary injunction.

An earlier case, Attorney General *v.* Richards,[6] decided in 1794, involved questions both of purpresture and nuisance, and is the first reported case of an injunction against a nuisance to the public right of navigation. The suit was by information in the Court of Exchequer to restrain the erection of wharves between high and

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[1] 2 Pleas of the Crown, Bk. I. c. 75, § 1.
[2] Baines *v.* Baker, 1 Ambl. 158; s. c. 3 Atk. 750.
[3] Mayor of London *v.* Bolt, 5 Ves. Jr. 129.
[4] Attorney General *v.* Cleaver, 18 Ves. Jr. 211.
[5] Crowder *v.* Tinkler, 19 Ves. Jr. 617.
[6] 2 Anstr. 603.

low water mark, and for the abatement of those already erected. It was alleged and argued that the erections were both a purpresture and a nuisance, the former as an encoachment upon the King's *jus privatum* to the soil between high and low water mark, and the latter as an interference with the *jus publicum* of free navigation.[1] It was conceded that, regarding the wharves as purprestures, the defendants could justify under a royal grant of the soil, but not if they were a nuisance. The *jus publicum*, though vested in the Crown, is inalienable, and held solely for the benefit of the public, for whom the King is bound to preserve it unimpaired.[2] But the jurisdiction of the court to enjoin or abate the structure as a nuisance was vigorously disputed. *Piggott & Richards*, for the defendants, say, at page 613: —

"As to the question of nuisance, that is a matter completely foreign to the jurisdiction of a court of equity. It is a breach of the general police of the kingdom, and as such is considered as a crime, and to be prosecuted in the criminal courts. But a court of equity cannot hold cognizance of any criminal matter. It never was attempted to prosecute a suite in equity to remedy any other public mischiefs, as to prohibit rope-dancing, plays, etc., or to abate a nuisance or purpresture on the highway. That is exactly like the present case, and is every day prosecuted in the ordinary criminal courts. Questions of nuisance are particularly improper to be discussed in equity, because the remedy at law is complete."

The court granted a decree abating the structure ostensibly as a purpresture, but as no inquiry was had to determine whether it were not more profitable for the King to have it remain subject to a rent, the decision can be better supported upon the theory of nuisance. In a similar case in 1819,[3] an application was made to restrain the erection of an embankment as a nuisance to the public rights in the Thames. Lord Eldon did not doubt his jurisdiction, and granted a temporary injunction pending the trial of an indictment.

In 1853, in Attorney General *v.* The Sheffield Gas Consumers' Company,[4] the Court of Appeal *held* that the tearing up of the pavements in a town for the purpose of laying gas-pipes, though

[1] For a discussion of these two rights, see Hale, De Jure Maris, p. 12; De Portibus Maris, pp. 81, 83, 88, 89.

[2] Compare, Hale, De Portibus Maris, p. 87.

[3] Attorney General *v.* Johnson, 2 Wils. Ch. 87.

[4] 3 DeG. M. & G. 304.

unauthorized, and therefore a nuisance, should not be enjoined, as the injury resulting to the public would be but slight. Upon this question of fact Lord Justice Knight Bruce dissented, and the correctness of the decision on this point may perhaps be questioned. Lord Justice Turner's statement of the principle underlying the jurisdiction of the court in such cases is, however, important. He says, at page 320: —

"I confess, however, that, looking at the principles on which as I apprehend this court interferes, it does not appear to me that there can be any sound distinction between cases of private and public nuisance. It is not on the ground of any criminal offence committed, or for the purpose of giving a better remedy in the case of a criminal offence, that this court is or can be called on to interfere. It is on the ground of injury to property that the jurisdiction of this court must rest; and taking it to rest upon that ground, the only distinction which seems to me to exist between cases of public and private nuisance is this, that in cases of private nuisance the injury is to individual property, and in cases of public nuisance the injury is to the property of mankind." [1]

The decision was followed in 1868 by the Court of Appeal in Attorney General *v.* Cambridge Consumers' Gas Co.,[2] where Lord Justice Selwyn, referring to the position of the Attorney General, said, at page 86: —

"He sues, as representing the public, by an original independent title, namely, as protector of the rights of the public against a nuisance to the public highway."

It seems then to be sufficiently evident that in the cases of public nuisances there is no exception to the general rule that equity has jurisdiction only in civil cases, and that its injunctions will issue only to prevent or remedy injuries of a civil nature to property. The general rule was much discussed and authoritatively stated in 1861, in the interesting and important case of Emperor of Austria *v.* Day.[3] There an injunction restraining the defendant Day from making notes purporting to be notes of the Hungarian state, or from delivering them to the defendant Kossuth, who intended to use them in Hungary, was sustained, on the ground that the plaintiff, as King of Hungary and representing the Hungarian people,

[1] Compare Saltau *v.* De Held, 2 Sim. N. S. 133, 154; Kavanagh *v.* Barber, 131 N. Y. 211.

[2] L. R. 4 Ch. App. 71, reversing s. c., L. R. 6 Eq. 282.

[3] 3 DeG. F. & J. 217.

had the right in Hungary of issuing money, and that this was a civil right having a pecuniary value, and therefore a property right, which equity should protect. *Roundell Palmer, Cairns, & Cotton,* for the plaintiff, sought to support the jurisdiction only upon this ground. They say, at page 225 : —

"All that is necessary to found the jurisdiction of this court is that there should be a direct clear interference with a right clearly connected with property. Cases on the revenue laws have no bearing; there is no doubt that no state takes notice of the revenue laws of another. The issue of these notes would be politically mischievous, and that is one great reason, no doubt, why the plaintiff wishes to restrain it; but we do not ask for the injunction on political grounds, but on the ground that the issue is an interference with a right of property of the plaintiff, and will inflict pecuniary injury on his subjects by bringing a quantity of spurious paper money into circulation."

And this was the view of the court. Thus Lord Campbell says, at page 240: —

"I consider that this court has jurisdiction by injunction to protect property from an act threatened, which if completed would give a right of action."

To the same effect Lord Justice Turner, at page 253, says: —

"I agree that the jurisdiction of this court in a case of this nature rests upon injury to property actual or prospective, and that this court has no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal, and do not affect any rights of property, but I think there are here rights of property quite sufficient to found jurisdiction in this court."

And in *In re* Debs,[1] the Supreme Court sustained the injunction issued at the time of the Chicago strike, in 1894, against interferences with interstate commerce, on the ground that the United States has an interest in the highways of interstate commerce, or is subject to an obligation toward the public regarding them, which entitles it to sue in equity to restrain unlawful obstructions. They say, at page 593: —

"A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offence against the laws of the land is necessary to call into exercise the injunctive power of the court. There

[1] 158 U. S. 564.

must be some interferences actual or threatened with property or rights of a pecuniary nature, but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by, or are themselves violations of the criminal law."[1]

Now it may perhaps be said that the maintenance of an illegal saloon, or a gambling, or other disorderly house, is not only a nuisance in the sense in which that word is used in the criminal law, but often works a very substantial injury to property rights. This is quite true, and upon proof of the injury it has been held that an adjoining owner is entitled to an injunction against the maintenance of a house of ill fame.[2]

Conversely, in default of proof of such injury the court has refused to enjoin the illegal sale of liquor,[3] or the illegal running of street cars on Sunday.[4]

It may well be, moreover, that a house in which liquors are illegally sold, or which is rendered disorderly by other unlawful acts, is of such a character as to affect the public in their use of the adjoining highway, or in their enjoyment of other public property rights. In such case an injunction might well be granted, though an indictment would usually afford an adequate remedy. But it is equally true that often the illegal sale of liquors or gambling may be so conducted as to work no perceptible injury to any such public right. Suppose, for example, that a hotel conducted in an entirely orderly manner serves wine to its guests at table. Is the Attorney General entitled to an injunction? In the absence of a statute, clearly not. Can he be given the right by statute?

We may, I think, concede that such legislation would not fall

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[1] See also Attorney General *v.* Utica Fire Ins. Co., 2 Johns. Ch. 371, 378; *In re* Sawyer, 124 U. S. 200, 210; Attorney General *v.* Tudor Ice Co., 104 Mass. 239, 240. The right of the Attorney General, as representing the *parens patriæ*, to restrain the commission by corporations or public bodies of *ultra vires* or illegal acts tending to the public injury, seems to rest upon special grounds. Such cases are concededly exceptional. See Attorney General *v.* Oxford &c. Ry. Co., 2 W. R. 330, 331; Attorney General *v.* Cockermouth Local Board; L. R. 18 Eq. 172; Attorney General *v.* Great Eastern Ry. Co., 11 Ch. D. 449; Attorney General *v.* Shrewsbury Bridge Co., 21 Ch. D. 752; People *v.* Ballard, 134 N. Y. 269; Attorney General *v.* Tudor Ice Co., 104 Mass. 239.

[2] Cranford *v.* Tyrrell, 128 N. Y. 341; Hamilton *v.* Whitridge, 11 Md. 128. Cf. Anderson *v.* Doty, 37 Hun, 160, *contra*.

[3] State *v.* Uhrig, 14 Mo. App. 413; Campbell *v.* Scholfield, 3 Pittsb. (Pa.) 443; Oglesby Coal Co. *v.* Pasco, 79 Ill. 164, *semble*. Compare State *v.* Crawford, 28 Kan. 726.

[4] Sparhawk *v.* Union Passenger Ry. Co., 54 Pa. St. 401.

within any of the prohibitions of the Federal Constitution. No question can of course arise except under the Fourteenth Amendment, as the first ten Amendments impose no restrictions on the State legislatures. And "due process of law," as used in the Fourteenth Amendment, does not require that modes of trial in all the States shall be the same, or that in any particular State they shall remain the same. A right to a jury trial in a particular case may be given in one State, and not in another; and such a right may be abolished without violating the prohibitions of that Amendment.[1] So far as judicial proceedings are concerned, its provisions seem to secure merely the right to a fair trial in a court of justice according to the modes of proceeding which under the laws of the State then in force are applicable.[2] That there was no violation of the right to such a trial by the liquor nuisance statutes we are discussing seems to have been the only point decided in Schmidt *v.* Cobb,[3] Kansas *v.* Ziebold,[4] Kidd *v.* Pearson,[5] and Eilenbecker *v.* District Court of Plymouth County.[6] Upon what seems to be the settled construction of "due process of law," as used in the Fourteenth Amendment, these decisions are very likely correct.

But the question arising under the State Constitutions is quite different. These were adopted not as a restraint upon many States with diverse systems of procedure, but with reference to but one jurisdiction, in which presumably the main features of practice both in criminal and in civil proceedings were well settled. "Due process of law," or the "law of the land," as here used, may, therefore, well be given a more restricted meaning, preserving the right to a jury trial in cases in which it was well established. In the words of Chief Justice Shaw, —

"These terms, in this connection, cannot, we think, be used in their most bald and literal sense to mean the law of the land at the time of the trial; because the laws may be shaped and altered by the legislature, from time to time; and such a provision intended to prohibit the making of any law impairing the ancient rights and liberties of the subject would under such a construction be wholly nugatory and void. The legislature

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[1] Walker *v.* Sauvinet, 92 U. S. 90; Missouri *v.* Lewis, 101 U. S. 22, 31, *semble;* Hallinger *v.* Davis, 146 U. S. 314. See also Hurtado *v.* California, 110 U. S. 516, 534.

[2] Davidson *v.* New Orleans, 96 U. S. 97; Hurtado *v.* California, 110 U. S. 516; Hallinger *v.* Davis, 146 U. S. 314.

[3] 119 U. S. 286.

[4] 123 U. S. 623.

[5] 128 U. S. 1.

[6] 134 U. S. 31.

might simply change the law by statute, and thus remove the landmark and barrier intended to be set up in this provision in the Bill of Rights. It must therefore have intended the ancient established law and course of legal proceedings by an adherence to which our ancestors in England before the settlement of this country and the emigrants themselves and their descendants had found safety for their personal rights."[1]

The State Constitutions, moreover, generally provide expressly that the right to a jury trial, both in criminal and civil cases, shall remain inviolate.[2] In Massachusetts the right to such a trial upon a criminal prosecution for a minor offence, such as a violation of an excise law, is not expressly provided for. But as a part of the "law of the land" it seems to be guaranteed, if "law of the land" is to be construed as it was by Chief Justice Shaw in Jones *v.* Robbins, *supra.* For as early as 1692, at least, penalties of fine and imprisonment were prescribed for the illegal selling of liquors. These penalties might be enforced by a justice of the peace.[3] But apparently ever since 1699 there has been a provision for an appeal from his decision to some court in which the accused would be entitled to a jury trial.[4] Furthermore, as the liquor nuisance statutes purport to provide for a civil proceeding, the various constitutional provisions regarding jury trials in civil suits seem to be applicable.

We have then certain acts condemned by the criminal law, for the punishment of which at the time of the adoption of the State Constitutions there was, in most of the States at least, a well set-

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[1] Jones *v.* Robbins, 8 Gray, 329, 342.

[2] Mass. Const., Part First: "Art. XII. . . . And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land."

"Art. XV. In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in cases arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it."

Ia. Const. Art. 1, sec. 9. "The right of trial by jury shall remain inviolate," etc. . . . Sec. 10: "In all criminal prosecutions, and in cases involving the life or liberty of an individual, the accused shall have a right to a speedy and public trial by an impartial jury."

See also N. H. Bill of Rights, Arts. 15, 20; Vt. Const., Ch. I. Arts. X., XII.; Ohio Const., Art. I. secs. 5, 10; W. Va. Const., Art. III. secs. 10, 13, 14; Kan. Bill of Rights, secs. 5, 10; N. D. Const., Art. I. secs. 7, 13; S. D. Const., Art. VI. secs. 2, 6.

[3] Acts and Resolves of the Province of Massachusetts Bay, Vol. I. p. 56, ch. 20.

[4] Ibid., p. 368, ch. I; R. St. c. 85, § 28; Gen. St. 173, § 1; P. St. c. 155, § 58.

tled system of procedure under which the accused was entitled to a jury trial. Of such acts equity had never taken jurisdiction. The Constitution adopted provided that the right to a jury trial in both criminal and civil cases should remain as then existing. Can equity subsequently be given statutory power to enjoin the acts, and, without the intervention of a jury, punish as a contempt a violation of its injunction?

It is probably true that the constitutional provisions cited do not prevent all statutory enlargement of equitable jurisdiction. The Constitutions are instruments of government, in the construction of which many things must be taken into account. When they were first adopted the States were comparatively young, and the society for which they were framed much less complex than now. Many questions of judicial procedure, and of substantive equitable and legal rights, which had not then arisen, have since become of importance, and other like questions will arise in the future. These questions the courts or the legislatures have been, and will be, called upon to settle. We should take quite too narrow a view to hold that in no case can equity take or be given a jurisdiction which the colonial or territorial courts had not asserted. The guaranties of "due process of law" and of "jury trial" had reference not merely to the incomplete and undeveloped systems of law which the local courts and legislatures had so far found sufficient for their needs, but to the whole body of law and system of procedure which the colonists brought from England, and which ever since have formed the basis of the judicial systems of the States. That at the time of the adoption of a particular constitution the courts or legislature had neglected or refused to extend the jurisdiction of equity to all cases to which it had been extended in England, does not necessarily prevent such extension in the future. Nor need the jurisdiction always be as limited as it may have seemed to be in England at the time of the Revolution. That equity had refused to act in certain cases of the same general class as those with which it commonly dealt, was often largely accidental. Such self-imposed limitations might be removed by a later and more enlightened chancellor, or might be abrogated by statute, without any real change in the nature of the jurisdiction. If the court of its own motion or prompted by statute moulds its jurisdiction to a developing civilization by taking cognizance of and extending its protection to new rights analogous to those which it has before protected, it cannot be charged with usurpation of powers. Nor

should a statute authorizing or directing such an enlargement of jurisdiction be held invalid. It was the system of equity as a whole, considered broadly with a view to its main fundamental principles, and with all its possibilities of legitimate development and growth in accordance with those principles, which was a part of the "law of the land" contemplated by the Constitutions.

But it by no means follows that equity can, with or without a statute, extend its jurisdiction without limit. Chancery is a civil, not a criminal court; a court for the protection of civil rights of property, using the term broadly, not for the prevention of assaults to the person, or for the enforcement of the police regulations of the State. These distinctions have always been fundamental. The chancellor cannot constitutionally enjoin the commission of a crime as such, without reference to its effect upon property rights, as a judge at circuit cannot constitutionally try a prisoner for murder without a jury. And statutes authorizing either would be equally invalid.

In Massachusetts itself, in ordinary civil proceedings, it is settled that the court in exercising an equitable jurisdiction given it by statute must preserve the right to a jury trial as to all issues previously so triable by the course of the common law. Thus in a statutory creditor's suit brought before judgment recovered at law, the defendant was held entitled to the verdict of a jury upon the issue of his indebtedness to the plaintiff. Field, J., says: —

"It is plain that the question whether the Raymonds are indebted to the plaintiff for goods sold and delivered is a controversy concerning property, which, when the Constitution was adopted, had been always tried by a jury in Massachusetts since the Province Charter, had been usually so tried before that charter, and had been so tried in England; that it is not a case in which a trial otherwise than by jury had theretofore been used and practised, or a case in its essential features unknown to the jurisprudence of the Province and the State at that time. The remedy which the plaintiff seeks is substantially the common law remedy. He seeks to establish his debt against the Raymonds, and to have it paid out of their property, which he alleges they have conveyed to Salmon by a conveyance which is fraudulent and void as to him. The rights sought to be determined and enforced are essentially legal, as distinguished from equitable rights. The statute has changed the mode of procedure, but it would be trifling with the Constitution to hold that, by changing the forms of procedure, the substantial rights declared by it can be taken away. In all controversies which are within the purview of that article of the Declaration of Rights, the 'method of procedure' of a trial by

jury must be held sacred, whatever the other forms of procedure may be." [1]

The same principle was stated with reference to statutory extensions of the jurisdiction of courts of admiralty in United States *v.* One Hundred and Thirty Barrels of Whiskey,[2] as follows:—

"And it is too clear to admit of doubt that, if these are cases *at common law*, they are within this clause of the Constitution, and the parties are entitled to a trial by jury. It is equally clear that Congress has no power under the Constitution to deprive a suitor of this right, by declaring that a case not properly within the jurisdiction of the admiralty shall be treated and dealt with according to the known principles of courts of admiralty." [3]

The same principle was by implication at least approved in United States *v.* Debs.[4] Judge Woods, in sustaining the validity of the fourth section of the Anti Trust Act of 1890,[5] authorizing injunctions against violations of the act, held that the case was one of equitable character, and that within the proper subjects of equitable cognizance, as established when the Constitution was adopted, it was competent for Congress to vest the court with the equitable power granted. And the Supreme Court in sustaining the jurisdiction of the court preferred to rest its decision on the ground that apart from the statute equity could at the suit of the government enjoin an interference with the highways of interstate commerce.[6]

As has already been suggested upon the facts of a particular

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[1] Powers *v.* Raymond, 137 Mass. 483, 485. See also North Pennsylvania Coal Co. *v.* Snowden, 42 Pa. St. 488; Haines's Appeal, 73 Pa. St. 169, 171.

[2] 1 Bond, 587, 588.

[3] Compare City of Janesville *v.* Carpenter, 77 Wis. 288, where a statute prohibiting the driving of piles or building of pier, etc. in a certain river provided that "the doing of any such act should [shall] be enjoined at the suit of any resident taxpayer without proof that any injury or danger has been or will be caused by such act." No question of rights to navigation being involved, the court held the statute unconstitutional, and refused to enjoin such erections by the owner of the soil. They say, at p. 299: "The legislature would have saved time and expense if it had issued the injunction in the case for which the act was made. This is the first time that any legislature of any enlightened country ever attempted to create an action without any *cause* of action, to authorize a complaint to be made to a court where there is nothing to complain of; to compel the courts to enjoin the lawful use and enjoyment of our own property 'without proof that any injury or danger has been or will be caused by reason of such act'; . . . or to adjudicate and decide the case, and then order and compel the court to execute its judgment by issuing an injunction."

[4] 64 Fed. R. 724, 753.

[5] 26 U. S. Stat. 209.

[6] *In re* Debs, 158 U. S. 564.

case, a liquor nuisance might work such an injury to either public or private property rights that it could be enjoined without statutory authority. And if the court refused to act because of the slight nature of the injury, it might perhaps constitutionally be authorized and directed to do so if some injury in fact existed. But there need be no injury at all, and the liquor nuisance statutes neither require nor contemplate proof of any such injury, actual or threatened. They are obviously not aimed at the protection of property, but at the prevention of crime, and by a method which, it seems, cannot constitutionally be employed.

The decisions sustaining the acts seem to have failed to draw the distinction between a use of property causing an injury to property which can be enjoined, and a use which is merely illegal, but so far as civil remedies are concerned works no injury and can afford no cause of action of a civil nature. They seem also not to discriminate between the public nuisance of the criminal law, which may consist of the doing of any illegal act which the statute declares to be a nuisance, and the public nuisance to property of which alone equity has taken or can take jurisdiction.

Arthur C. Rounds.